THE AGE

ARTICLE FOR STUDENTS OF LEGAL STUDIES

LAW-MAKING BY JUDGES

IN THE FOOTSTEPS OF THE GREAT MASTERS OF THE JUDICIAL ART

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Justice Michael Kirby, CMG*

AN END TO FAIRY TALES

When I was at law school the "declaratory" theory of the law held sway. These were the years of "strict and complete legalism". That is the way the then Chief Justice of Australia (Sir Owen Dixon) - a great jurist - described the judicial role. The function of the judges would have "lost its meaning and purpose" if there were no fixed, discoverable, external "standard of legal correctness". Judges applied the law. They did not make it.

Undoubtedly, this is still the view which the public has of the judges. According to this view, judges have only to discover the law (either in the acts of Parliament or in the case books which collect the common law). Their function is then purely mechanical - apply the law to the facts and (lo and behold) the answer to the legal problem appears - as if by a machine.

Very few lawyers (fewer still judges) believe in this mechanical description nowadays. One of the greatest lawyers of this century, Lord Reid, denounced it as a "fairy tale":

> "Those with a taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. But we do not believe in fairy tales anymore".

Since Lord Reid ridiculed the mechanical description of judicial work, it has been much harder to take seriously the notion that judges do not make law. Nowadays, the debate is not really about whether judges (especially in the highest courts) make and develop the law as their predecessors have done in England for 600 hundred years. Today, the controversy is about the extent to which judicial lawmaking occurs; when a case is apt for development of the law and the techniques that should be used by judges in stretching old law and fashioning new.

Into the equation must be put a number of factors. The first, is the place of the judge in the court hierachy. A judicial officer at the bottom rung (a magistrate) has much less opportunity to make new law. Normally he or she is busy applying well known statutes (such as laws on motor traffic) to familiar, recurring fact situations. But even at this level, with so many new Acts passed by Parliament, meaning will have to be given from time to time to unfamiliar words. This gives the magistrate the inescapable opportunity of choice and creativity.

As you ascend the judicial ladder, those opportunities present more frequently. By the time a case reaches the appeal bench of a State Supreme Court or the High Court of Australia (the final court in our country) the obligation to consider lawmaking presents itself every other day. This is because at this level:

* the judges have to decide between conflicting rules and thus to express a new rule;
* the judges must give an authoritative meaning to ambiguous language in an Act of Parliament; and

* the judges have to decide whether a rule of common law, developed for earlier social conditions, should be refashioned to ensure justice in entirely new social conditions.

LIMITS ON JUDICIAL LAWMAKING

An example of the last category is the High Court case of State Government Insurance Commission v Trigwell in 1978. An earlier common law rule, made by judges to suit the social conditions of village England, said that landowners were under no liability for damage caused by cattle or sheep that stray onto a highway. With the development of the fast motor car, this rule could sometimes work an injustice to people injured because a landowner had not fenced a property adjoining a roadway. But should the judges modify the rule for the very different circumstances of modern Australia? The High Court decided against change. The present Chief Justice (Sir Anthony Mason) expressed clearly the reasons for restraint in judge-made law, even in the highest court in the land:

> "The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility: they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law."

Sir Anthony considered that these were functions to be left to Parliament guided by law reform bodies. But he conceded that there were cases where sometimes "an ultimate court of appeal

can and should vary or modify what has been thought to be a settled rule of the common law on the ground that it is ill adapted to modern circumstances." So it is in developing - and restating - the common law. The same goes for giving meaning to Acts of Parliament. They are expressed in words. Sometimes the words are clear. Sometimes they have been made clear by court decisions. But because the English language is a mixture of the Germanic tongue of the Anglo-Saxons and the French brought over by the Norman Conqueror, it is especially rich in double meanings. The same goes for giving meaning to passages of the common law contained in the case books. This great body of law, which we have inherited from England, is even today, the repository of our basic liberties. Yet it was developed over the centuries by judges. It should therefore not be surprising that judges today will sometimes do a little developing of their own. Just as their predecessors have done for centuries.

Some rules of the law are particularly unsuitable for judicial creativity. Recently, in my court, it was suggested by the Crown that the court should adapt and modernise the criminal law of "riot" - to redefine the offence in a way said to be more suitable to modern social needs to deal with people in mobs. I said (and the other judges agreed) that the criminal law, particularly the law of public order offences should not be changed by judges. Having stood for hundreds of years, if modern adaptation is needed, that is a matter for the elected representatives in Parliament. After all, they have the legitimacy in lawmaking which comes from the ballot box. Judges, in Australia, are not elected. This central fact of life deprives judges in our country of the entitlement to

create new law in a bold, sweeping way. In the United States judges can act more boldly. Many of them are elected. Most of them have opportunities to consider and apply basic statements of human rights contained in a constitutional Bill of Rights, expressed in language of great generality. This is not the case in Australia. Democratic legitimacy, historical tradition and the opportunity of ordinary practice confine judge-made law in this country to the "minor key". Furthermore, judicial inclination to develop the law varies from judge to judge and from case to case.

TECHNOLOGY AND THE NEED TO ADAPT THE LAW

Just the same, changing technology and rapidly changing social conditions occasionally stimulate judicial creativity. In 1986, the House of Lords in England in Gillick v West Norfolk Health Authority had to consider the right of Mrs. Gillick, mother of ten, to control the advice on contraception that would be given to her daughters who were under the age of 16 years. The Law Lords decided that a girl under the age of 16 had the legal capacity to consent to medical treatment, including contraceptive treatment, if she was sufficiently mature and intelligent. Lord Scarman described a 19th century case, which asserted the power of a father over his child, as "horrendous" and "rightly remaindered to the history books". When he wrote his judgment in this case, Lord Scarman was aged 74. It was on the eve of his retirement. He had been the first Chairman of the English Law Commission, a body set up to advise Parliament on the modernisation and development of English law. He had lost none of his reforming zeal. He expressed it, clarion like, in these words in his judgment:

> "The law ignores [contraception, increasing independence of young people and the changed status of women] at its peril. [Our] task therefore, as the Supreme Court in a legal system largely based on rules of law evolved over the years by the judicial process, is to search the overfull and cluttered shelves of the law reports for a principle, or set of principles recognised by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work. It is, of course, a judicial common place to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted upon. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search our principle, to discard the detail appropriate (perhaps) to earlier times, and to apply principle in such a way as to satisfy the needs of their own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead of the great masters of the judicial art."

THE MIXTURE - CHANGE AND STABILITY

Well, how have the judges in Australia fared, treading in the footsteps of the great masters of the judicial art? In the world league of the common law, our judges tend to be less inclined to develop judge-made law. Perhaps this is because of the long standing link to the Privy Council in London which dampened local creativity. Perhaps it was our sheer distance from the source of much of our law and our fascination with things English. The absence of a Bill of Rights removed one source of creativity. The tradition of strict legalism discouraged it. For all that, things are now changing. In the last year or so, in my own court many important developments of judge-made law have occurred:

* The Court has developed the rules on abuse of process, to halt criminal proceedings which have been too long delayed.

* The Court has required an Attorney-General to give a hearing to a group of magistrates who were not reappointed to a new court because of secret complaints which were never put to them.
* The Court has held that persons, not parties to the actual contract, can in some circumstances sue for the benefits of an insurance policy.
* It has also been held that there was a right to reasons for bureaucratic decisions adversely affecting the citizen.

The lastmentioned decision was reversed by the High Court of Australia as going too far. The interaction between different courts and different personalities in the one court demonstrates the genius of our common law system. It is a system developed by judges. Today's judges have the responsibility to continue this development of the law. Rapidly changing times make that aspect of their work more urgent and important. Great reforms and sweeping changes must be left to the elected representatives in Parliament. But if they are uninterested or neglect modernisation and development of the law, the judges have their own functions to perform. They tread, however inadequately, as Lord Scarman said, in mighty footsteps. The genius of our legal system lies in its special mixture of certainty and adaptability, stability and development. For the sake of a just society, living by fair and modern laws, it is vital that judges know the limits of their lawmaking function. But it is equally vital that their creative function should be recognised and understood by citizens - and by the judges themselves.

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